Study L-4000 April 15, 1998

Memorandum 98-28

Health Care Decisions: Staff Draft Tentative Recommendation

Attached to this memorandum is the staff draft tentative recommendation on *Health Care Decisions for Incapacitated Adults*. (The staff recommends adding the last three words to the recommendation title in response to a recurring need to explain the scope of the recommendation, particularly to those who have just become aware of the study.) This draft implements decisions made at the March meeting. Issues that were not addressed at the last meeting are noted below and in staff notes in the draft. The explanatory text and the conforming revisions have not been discussed at previous meetings.

A number of exhibits are also attached to this memorandum:

SCHEDULE

There are only a limited number of issues that need to be resolved before the draft tentative recommendation can be distributed for comment.

If the Commission completes its review of the draft at the April meeting, and if we are close enough to final language, the staff can complete the tentative recommendation and send it out in early May with a July 31 return date. Comments would be considered at the September meeting — this would provide nearly three months for review by interested persons and time for the Commission to consider their comments at one or two meetings in the fall. Ideally, we could have a final recommendation prepared in plenty of time for introduction in the 1999 legislative session. If the Commission wants to consider the tentative recommendation one more time before distributing

it, this could be done at the June 4 meeting, but that would probably push the time for consideration of comments back to the October meeting.

At the April meeting, we need to concentrate the discussion on new policy implementations and some issues in other parts of the draft raised below and in staff notes that remain from the March meeting. A number of technical revisions have been made as a result of additional staff review and the detailed comments provided by Harley Spitler (see generally Exhibit pp. 3-14).

PRELIMINARY PART

The draft preliminary part was distributed for the March meeting (attached to the First Supplement to Memorandum 98-16). The staff has not had time to flesh out this material as we would like, so the material in this draft still has some gaps and rough spots. We have not received any comment on this material, except from Harley Spitler (see Exhibit p. 9) and the staff has adjusted the text in response to his comments.

STATUTORY MATERIAL

Revocation — §§ 4695-4698, at pp. 28-30

These basic rules on revocation have been redrafted to adopt the uniform act approach, as decided at the March meeting.

Issues remain concerning the scope of the rule on revocation by dissolution or annulment. The Commission directed the staff to give further consideration to the existing rule in light of the uniform act. These rules differ in that draft Section 4697 *does not* provide for revocation on legal separation or filing for dissolution and it *does* provide for revival on remarriage. This is exactly the same structure existing for powers of attorney generally (Prob. Code § 4154) and health care powers (Prob. Code § 4727(e)). It is also the same as the rule applicable to wills under Probate Code Section 6122(a)-(b). And it is the rule applicable to statutory wills under Probate Code Section 6227. The PERS statute (Gov't Code § 21492) does not revoke on legal separation; it does not contain a revival rule. Only the federal absentee statute in Probate Code Section 3722 revokes a power of attorney on legal separation, and it goes even further and revokes on *commencing* a proceeding for dissolution, annulment, or legal separation; it does not provide for revival.

The staff does not believe it is appropriate to revise only the rule applicable to powers of attorney for health care, unless there is some significant distinguishing policy reason that can be identified. We have not found one. Perhaps those involved in drafting the UHCDA can assist in explaining the difference in policy. (Note that Section 2-804 of the Uniform Probate Code (1993) does not revoke testamentary dispositions on legal separation and does revive on remarriage.) It may be argued that health care powers are more personal, and should be revoked (or suspended?) if the parties' relationship has deteriorated to the extent that they have obtained a legal separation. But others could argue that filing a petition also evidences a breakdown that should revoke the health care power. The argument was made, successfully in California, that only a final dissolution or annulment is significant enough to revoke the power.

The staff recommends continuation of the existing revocation rule in draft Section 4697 until the subject can be studied generally. The revival rule does not seem particularly important in practice, but it does avoid invalidating some instruments. In any event, it is existing law and that law was enacted (except for the statutory will) on recommendation of the Commission. If it is to be changed, the staff believes it would be best to consider all of the similar sections together, and that should be a separate study. The same reasoning applies to the more significant issue of revocation on legal separation. Our aim should be to provide consistent rules unless there is a good reason to depart from consistency. The draft rule in Section 4697 is consistent with existing law and should not be changed simply to adopt the rule in Uniform Health-Care Decisions Act 3(d).

If it turns out that the difference between the uniform act and the California rule creates a problem some day when some form of uniformity develops, then it would be appropriate to reconsider the issue. As of now, there is no uniformity among the three states that have adopted the substance of the UHCDA — New Mexico revokes on filing a petition and revives on withdrawal or amendment of a petition for dissolution, etc.

Health care surrogates — §§ 4712, at pp. 40-42

Some issues are discussed in the Staff Note concerning the statutory surrogate priority list, and other matters.

Decisions for the "unbefriended" patient— §§ 4720-4725, at pp. 43-47

Additional revisions have been made in this procedure following the March meeting, and several commentators have raised important issues (discussed in Staff Notes) that need to be reviewed.

Statutory damages — § 4742, at pp. 52-53

The Staff Note considers the issue whether other remedies are adequate and other issues with regard to this section. Serious consideration should be given to the suggestion of Professors Larson and Eaton (1) that the patient (and the patient's estate) should not have to pay for health care *provided* in knowing violation or reckless disregard of an advance directive, and (2) that the patient (and the patient's estate) should be able to recover more than nominal damages where a health care provider *fails to provide* treatment in knowing violation or reckless disregard of an advance directive.

Petitioners — § 4765, at pp. 58-59

The Commission needs to be sure that the class of permissible petitioners is correctly described and not overly inclusive. Harley Spitler has also raised a question about whether this section imposes a priority. See Exhibit p. 12 (directed toward the similar existing section). It does not.

Request to forego resuscitative measures — §§ 4780-4786, at pp. 62-64

The draft statutes have carried this procedure forward without much change. The DNR statute was enacted fairly recently and is self-contained.

Secretary of State's registry system — §§ 4800-4805, at pp. 64-66

This procedure has not been discussed at any prior meeting. We will attempt to get commentary from the Secretary of State's office once a tentative recommendation is approved.

Other Issues

There are other Staff Notes raising technical issues in the following locations in the statutory material in part B of the draft:

CONFORMING REVISIONS AND COMMENTS TO REPEALS

The conforming revisions portion of the draft tentative recommendation includes conforming amendments in the Power of Attorney Law and other parts of the Probate Code, Comments showing the disposition of repealed sections in the Health and Safety Code and the Probate Code, and revisions needed in existing Comments in the Power of Attorney Law.

The Commission has not reviewed most of this material. Comments to repealers generally duplicate information in source Comments, so much of the information is not new. Several earlier memorandums considered issues involving parts of these conforming revisions, e.g., the Natural Death Act (Health & Safety Code § 7185 *et seq*..), which was attached to Memorandum 97-41, the first staff draft.

At the meeting, the staff does not intend to go through this material in any detail, but there are some issues raised in staff notes following two sections:

Replacement of medical intervention procedure — Health & Safety Code § 1418.8, at pp. 71-73

Criminal penalties under Natural Death Act — Health & Safety Code § 7197, at p. 79

If anyone has concerns with any other parts of this material, you should raise them at the meeting.

Harley Spitler raises a number of technical issues concerning disposition of the Natural Death Act. See Exhibit pp. 10-11. Some matters relate to drafting style (which we believe are settled issues), such as whether to put definitions in separate sections or all in one section. Other matters are more substantive, such as whether the phrase "terminal condition or permanent unconscious condition" should be retained in the legislative findings in Probate Code Section 4650. These terms were omitted because they act as a *limitation* on the finding concerning patient autonomy. In the broader context of the draft Health Care Decisions Law, these limitations are inappropriate, although they make perfect sense in the Natural Death Act, which applies only to patients in a terminal or permanent unconscious condition. Without getting into the detail here, it should be noted that the

Uniform Health-Care Decisions Act is intended to replace the type of statute represented by the Natural Death Act. The history of the NDA and earlier uniform acts (the two Uniform Rights of the Terminally Ill Acts) have been presented in earlier memorandums and the Commission decided to replace the NDA with a broad statute based on the Uniform Health-Care Decisions Act. Thus, there is no place for continuing a declaration or directive under the NDA in this scheme. The draft statute and the optional form completely cover the subject matter of the NDA.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Table Showing Location of UHCDA Provisions in Draft Statute

UHCDA	Current Draft
1(1)	4605
1(2)	4607(a)
1(3)	4609
1(4)	4613
1(5)	4615
1(6)	4617
1(7)	4619
1(8)	4621
1(9)	4623
1(10)	56
1(11)	4625
1(12)	4627
1(13)	4629
1(14)	4631
1(15)	74
1(16)	4637
1(17)	4639
2(a)	4670
2(b) snt. 1	4671(a), 4684(a)
2(b) snt. 2	4627, 4680(b)
2(b) snt. 3	4671(a)
2(b) snt. 4	see 4660
2(c)	4683
2(d)	4658
2(e)	4685
2(f)	4750(b)
2(g)	4672
2(h)	4674
3(a)	4695(a)
3(b)	4695(b)
3(c)	4696
3(d)	see 4697
3(e)	4698
4 intro ¶	4700
4 form	4701
5(a)	4710
5(b)	4711
5(c)	see 4712(a)-(c)
5(d)	see 4712(d)
5(e)	see 4712(b)(1)
5(f)	4713
5(g)	4750(c)
5(h)	4714
5(i)	see 4660
5(j)	see 4712(d)
6(a)	
6(b)	4686
6(c)	*Drabick*
7(a)	4730
7(b)	4731
7(c)	4732
7(d)	4733
7(e)	4734
7(f)	4735
7(g)	4736
7(h)	4675
8	4676
9(a)	4740
9(b)	4741
10(a)	4742(a)
10(b)	4742(b)
11(a)	4651(b)(1)
11(b)	4657
12	4661
13(a)	4655(a)
13(b)	4656
13(c)	4653
13(d)	4654
13(e)	see 4652(a)
13(f)	no
14	see 4750 *ff*
15	2(b)
16	4601
17	11
18	3, 4665 *ff*

From: KTC001 <KTC001@aol.com>
Date: Tue, 24 Mar 1998 22:21:38 EST
To: sulrich@clrc.ca.gov
Subject: Re: Health Care Decisions

I have been following the California Law Revision Commission's work on recommendations for revisions to the Health Care Decisions law. As the Director of the Regional Ethics Office of TPMG, I have also shared your draft recommendations with the chairs of our hospital ethics committees in Northern California. We want to applaud the work of the Commission in recommending some much-needed changes in the law, which should make the forms more accessible and less intimidating to our patients.

However, I question the need to include a specific instruction on nutrition/hydration in Part 2.

1) For the purpose of ensuring awareness, this issue is already raised under Agent's Authority;

2) This decision at the end of life can be tricky. Many times continuing nutrition/hydration leads directly to patient harm, through increased secretions, aspiration and pneumonia, edema, nausea, and more. Asking patients to make this decision in a binding manner ahead of time, without full knowledge of the possible impact on their well-being, is not doing them a service. Giving this decision it's own instruction unnecessarily emphasizes nutrition/hydration over other technical decisions, such as dialysis or the use of vasopressors, and will surely lead many patients to indicate an inappropriate binding decision.

3) If the patient has a particular issue with nutrition/hydration, they can write it in, just as Jehovah's Witness patients would for refusal of blood and blood products;

I am looking forward to further drafts and the conclusion of your work this fall.

Sincerely,

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HARLEY J. SPITLER
415 693-2060

March 10, 1998

Stan Ulrich
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California Law Revision Commission
4000 Middlefield Road, D-1
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Re: CLRC Staff Memorandum 98-16 dated March 2, 1998

Dear Stan:

This letter contains my comments re CLRC Staff Memorandum 98-16 dated March 2, 1998. If I make no comment, I approve the section.

Stan, my overall comment: You have produced a very thorough tentative recommendation. David English is your best source to determine the *intent* of the UHCDA Drafting Committee. David, alone and/or with Michael Franck, did the major drafting of the Act. I believe that David, *alone*, prepared the comments.

I. DEFINITIONS.

a. **§ 4609:** OK I hope that you will be able to persuade the CLRC that any additional detail, standards or procedure should *not* be added and is not needed.

b. **§ 4625:** Delete "and surgeon" for the reason that *every surgeon is a physician*!

c. **§ 4639:** Change "part" to "*Division*"

II. GENERAL PROVISIONS.

a. **§ 4650(c):** Change to read:

> (c) In recognition of the dignity and privacy a person has a right to expect, the law recognizes that an adult has the right to instruct his or her physician to continue, withhold or withdraw life-sustaining treatment, in the event that the person is unable to make those decisions.

"To withhold or withdraw life sustaining treatment does not include "*to continue*"! This is a very important change!

"*for himself or herself*" seems superfluous and should be deleted.

b. **§ 4651(a):** Delete "*for himself or herself*" for same reason as in 4650(c).

c. **§ 4653:** Delete "so as to permit the natural process of dying." Very important change! Most acts authorized by the principal(P) pursuant to the P's advance health care directive, or by a surrogate either slow up or speed up "*the natural process of dying*". An individual does not need any instrument to cause his "natural process of dying"! That is how most people, in the United States, die! They just die!

d. **§ 4659:** Add the term "*continuance*" before the word "withholding" in lines 8 and 9 for same reason noted above re § 4650(c)!

e. **§ 4660(a)(1):** Delete! This section prohibits the P's "*primary physician*" from making a health care decision for P.

f. **§ 4660(a)(2):** Add "(except P's primary physician)" after the word "employee" in line 27. I am assuming that in some hospitals, P's "primary physician" would be either an "*operator or employee*".

g. **§ 4660(c)(3):** Delete the brackets in lines 41 and 42.

h. **§ 4660(d):** Add ", or decision making by," after the words "participation in" in line 5, page B-14.

i. **§ 4662:** Change to read:

The general law of agency applies to powers of attorney except where this division provides a contrary rule.

Three comments:

(i) Do *not* omit this section. Many attorneys do not even know that health care directives are agencies!

(ii) I have phrased my clause in the positive-rather in the negative language of the staff draft.

(iii) Delete the technical stuff! Make it simple! If you want the technical stuff, put it in a comment.

j. § 4665(a):

This section, as written, creates an impossible situation in those cases in which the P has become incapacitated before January 1, 2000.

You should assume that there is not a single advance health care directive that meets all of the requirements of your March 2, 1998 staff draft. Hence, please consider making the March 2, 1998 staff draft prospective only, that is, *to apply only to instruments executed after January 1, 2000*!

III. ADVANCE HEALTH CARE DIRECTIVES.

a. Powers of Attorney for Health Care.

Re Staff Note: The term "adult" is correct in subdivision (b). Stay away, totally, from "unemancipated minors"; that area of the law is too complex and unsettled.

b. § 4689(a): The words "or otherwise indicates that the law of this state governs the power of attorney" are troublesome, very difficult to apply in practice and should be deleted.

IV. MODIFICATION AND REVOCATION OF ADVANCE DIRECTIVES.

a. § 4695(b): Change to read:

(b) An individual may revoke all or part of an advance health-care directive at any time and in any manner that communicates an intent to revoke.

Revocation should be simple procedure. There is absolutely no reason to require a writing!

b. **§ 4696:**

(i) Delete "orally or in writing" in lines 24 and 26. Unnecessary as there can only be those two ways!

(ii) I do not understand Marc Hankin's concern.

c. **§ 4697:** change to read:

A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for health care.

(i) § 4697(a) is wholly inadequate in that it does not cover "legal separation" which is very common.

(ii) § 4697(b) is very scary! There should not be automatic reviver! If P is foolish enough to again appoint his spouse, he can execute a new power of attorney for health care.

d. **§ 4698:** Change to read:

An Advance Health Care Directive that conflicts with an earlier Advance Health Care Directive revokes the earlier directive to the extent of the conflict.

(i) The staff's section is ok but is too long. Simplicity is helpful to all principals!

V. OPTIONAL FORM OF ADVANCE HEALTH CARE DIRECTIVE.

a. **Explanation**

(i) Delete "a residential long-term health care institution"; and substitute:

"Residential care facility for the elderly"
No brackets!

b. **Part 1**

In (5) delete "[Guardian]" in three places; and substitute "Conservator" which is a defined term. "Guardian" is not a defined term.

No brackets!

c. **Part 5:** There is no "Section *4673* of the Probate Code"

Stan, this is the only place CLRC deals with the *practice* of law. All other material is concerned with *substantive rules of law - either legislative or decisional.* As you know, the U.S. Congress is becoming increasingly interested in the subject of health care decision making. I am enclosing a paper I presented on February 24, 1998 at the 1998 Annual meeting of ACTEC in Orlando. Please carefully read the sections re the two mirror bills (one in the Senate and one in the House) dealing with health care decision making. These bills will move very slowly. However, one thing is quite certain: 5 or 10 years from now, there will be some mandated *federal* requirements for all DPAHCs and health care directives that deal with continuance, withholding or withdrawal of medical treatment or procedures to keep the principal alive.

So, I am using the following, or a similar, clause in my instruments:

"_____ you are directed, from time to time, to add an addendum to this instrument to include any clause(s) that may be required to conform this instrument to any federal legislation that may be enacted after the date of this instrument"

Possibly, something like that clause could be *Part 5: Federal Requirements* of the optional form.

VI. HEALTH CARE SURROGATES

a. **§ 4711:** Delete brackets.

b. **§ 4715(a):** After the terms "replaced" add "by the primary physician."

VII. HEALTH CARE DECISIONS FOR PATIENTS WITHOUT SURROGATES

a. **§ 4724:** change opening words of second sentence to read:

PROPOSED AMENDMENTS

§ 4652. Unauthorized Acts

This division does not authorize an agent or surrogate to consent to any of the following acts unless the individual's written advance health care directive expressly so provides:

a. Commitment to or placement in a mental health treatment facility.

b. Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code).

c. Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).

d. Sterilization.

This division does not authorize an agent or surrogate to consent to any individual's abortion.

The reason for the different treatment of abortion: it deals with *two lives*: the mother and the fetus!

Best Wishes Always,

Harley

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April 16, 1998

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Assistant Executive Secretary
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Re: First, Second and Third Supplement to Staff Memorandum 98-16

Dear Stan:

This letter contains my comments re the First, Second and Third Supplement to Staff Memorandum 98-16. If I make no comment, I approve the section.

FIRST SUPPLEMENT

I. **Footnote 25**: Where does it say that "the statutory form power of attorney for healthcare cannot be notarized"? I believe that any signature on any instrument can be notarized.

II. **Family Consent: Your following statement is not correct:**

"Existing California Law

California statutory law does not provide general rules governing surrogate decisionmaking. However, the procedure governing consent to "medical interventions" regarding residents in nursing homes directly implies that the "next of kin" can make decisions for incapacitated persons by including the next of kin in the group of persons 'with legal authority to make medical treatment decisions on behalf of a patient.'"

There is nothing in H&S Code 1418.8(c) that implies, directly or indirectly, that the "next of kin" "can make decisions for incapacitated persons" generally! The provisions of H&S Code 1418.8(c) are limited under H&S Code 1418.8(a) to "a resident in a skilled nursing facility or intermediate care facility"!

SECOND SUPPLEMENT

I. HEALTH AND SAFETY CODE 1418.8 LEGISLATIVE FINDINGS AND INTENTIONS

Stan, Legislative Findings and Intentions are very important. Increasingly, they are used by courts in the construction of a statute. I cannot determine from your staff note which "uncodified legislative findings and intentions...accompanied Health and Safety Code Section

1418.8 when it was enacted." If those Legislative Findings and Intentions are in the three paragraphs of 1992 Cal. Stat. ch. 1303 that follow your staff note, I favor including them.

II. DISPOSITION OF NATURAL DEATH ACT

a. §7185.5: The Legislative Findings and Declarations are most important and should be included.

I prefer the findings and declarations in §7185.5 to those in §4650.

b. §7186: I do not favor your proposed scattering of definitions in various sections of the Probate Code. I have never seen a health care statute that does that. All definitions should be in one section to simplify reading.

(i) Subdivisions (d) and (e) should be continued

(ii) Delete "and surgeon" in Pr. C 4625. A "surgeon" is a physician!

(iii) Pr. C 4670 is wrong reference to subdivision "(h)"!

(iv) Subdivision (j) should be retained

Stan, please take a long look at the very careful and concise way the definitions are set forth in the Natural Death Act (H & S Code 7186). Or in the UHCDA (Section 1). Then compare those with your proposed scattering of definitions in various sections of the Probate Code.

c. §7185.5(a): I strongly prefer §7185.5(a) to §4650. "Terminal condition or permanent unconscious condition" should not be eliminated!

d. §7186.5(b): Your following statement is not accurate: "The declaration form in subdivision (b) is superseded by the optional form of an advance health care directive in Probate Code Section 4701and related substantive rules." The declaration in §7186.5(b) should be retained. There is no "declaration form" in §4701.

e. §7186.5 Comment: As 7186.5 does not deal with conscience or institutional policy, the last sentence of the comment is misplaced in your memorandum.

f. §7187.5: Change term "declaration" to "directive" in title and in lines 27, 31, 35 and 39.

I would retain §7187.5 with above correction.

g. §7188(a): I strongly prefer the clarity, brevity and simplicity of Section 3(b) of the UHCDA:

> "(b) An individual may revoke all or part of an advance health-care directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke."

h. §7189: Retain this section after making the following term changes: change "declarant" to "patient" in line 8; change "declarant's" to "patient's" in line 10; change "declaration" to "directive" in lines 9, 10 and 11.

Please note that "terminal condition or permanent unconscious condition" are in this section; that is why those words should not be eliminated from §7185.5(a). As both "terminal condition" and "permanent unconscious condition" are very critical concepts in any health care decisions statute, they must be defined. Compare the definitions in H & S Code §7186(e) and (j).

Stan, I now have discovered where you went wrong in the use of the term "declarations" instead of "directive". It is in H & S Code §7186(b) which makes that error. The Natural Death Act was in the legislative process for several years prior to 1976 – long before the present terms "directive" and "health care directive" became modern terms. "Declarations" was a good term in 1976 – but not now!

i. §7189.5(b): Should be retained.

j. §7189.5(c): Why have you eliminated this subdivision?

k. §4742(a) and (b): Strongly concur in the staff recommendation that the limits be revised to at least $2,500.00 and $10,000, respectively.

l. §4675: Please at least think about permitting an insurance carrier to have a lower rate structure for those persons who have an advance health care directive in effect at the time(s) the policy is issued and renewed. That, most certainly, is not undue influence. The same comment pertains to §7191.5(b) and (c).

m. §7191(b): Should be retained. Same comment re words "terminal condition or permanent unconscious condition" as noted above under §7189!

III. PROBATE CODE

a. §4625: I have commented many times on this unfortunate section.

There is no reason whatsoever, public policy or otherwise, why a Principal (P) should be prohibited from authorizing his agent to "make, publish, declare, amend, or revoke" P's will. Several comments:

(i) The term "publish" is obsolete and should be eliminated. Compare U.P.C. §502(a)(2) Comment.

(ii) §4265(a) is far too rigid for these more modern times. I strongly favor U.P.C. §502(a)(2) which uses the "Testator's Conscious presence" test. Compare U.P.C. §502(a) comment re cases cited on "Testator's" conscious presence".

Similarly there is no reason whatsoever, public policy or otherwise, why a Principal (P) should be prohibited from authorizing his agent to consent to any or all of the acts and procedures set forth in Prob. C §4722(a), (b), (c) and (d). Prob. C §4722(e) should be retained because it deals with two lives: (i) The mother; (ii) the fetus.

IV. JUDICIAL PROCEEDINGS

a. General Provisions

(i) §4503(b)(2): Change "Section 4542" to "Section 4541" in line 5.

b. Petitions, Orders, Appeals

(i) §4540: I, and other members of Leah V. Granof's Advance Directives Committee would move subsection "(k)" ["Any other interested person or friend of the principal"] to subsection "(c)".

Stan, shouldn't these persons be prioritized? Or, do you intend that the first persons to file a petition always prevails?

(ii) §4654: No! New Section 4665 does not solve the very practical, and common, problem that was attempted to be solved by Prob. C Section 4654(b).

Prob. C Section 4654(b) serves no useful purpose and should be repealed. Or, if you want something about length of time say:

"(b) Unless a shorter period is provided in the durable power of attorney for health care, a durable power of attorney for health care described in subdivision (a) never expires solely by lapse of time."

(iii) §4702: See page 2 of my March 9, 1998 letter:

"**§4660(a)(2):** Add "(except P's primary physician)" after the word "employee" in line 27. I am assuming that in some hospitals, P's "primary physician" would be either an "*operator or employee*".

§4660(c)(3): Delete the brackets in lines 41 and 42.

§4660(d): Add ", or decision making by," after the words "participation in" in line 5, page B-14.

§4720: I believe **all** sections references in **§4720** are wrong!

§4721: Again, wrong reference **§4737** has nothing whatsoever to do with **§4721**. In **§4721**, I suggest changing "may" to "shall" in line 41 on B-41.

[**Note to Stan:** I'm not commenting on **§4722** through **§4948** because there appear to be wrong section references throughout those sections. I will await your next draft.

REVISED COMMENTS

§I: I admire your precision in terminology. However, your eleven terminologies will not be comprehensive to the average layman and will require a well-trained attorney to delineate between the various terms.

[Note to Stan: Same as above note re: **§4014** through **§4450**. I await your final draft.]

THIRD SUPPLEMENT

Dr. Orr's comment:

"My only comment is on para 4724 where the surrogate committee's consensus or majority decision may be negated by a lone dissenter. I recognize the need for protection of vulnerable individuals, and this provision may need to be left as is in order to fulfill that need. However, I can envision a situation where a single family member might then be able to dictate a plan of treatment which several other involved individuals believe is contrary to the patient's best interests. I don't really have any constructive way to change this, but thought I would raise this for the Commission's consideration."

has been considered, at length, by Leah V. Granof's Advance Directives Committee; and was rejected by, I believe, a unanimous vote of the Committee. Most certainly, the vote of the surrogate committee to kill the patient should be unanimous! One would like to ask Dr. Orr if he would want his life to be terminated by a simple majority vote of any group.

Best wishes.

Sincerely,

Harley

Harley J. Spitler

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April 1, 1998

To: Stan Ulrich, Assistant Executive Secretary

Thank you for sending me the California Law Revision Commission's "Health Care Decisions" staff memos and recommendations which I use to help update the San Diego County Medical Society Bioethics Committee. At our last meeting, discussion was held on "Health Care Decisions for Patients Without Surrogates." Feedback from representatives of both acute and longterm care facilities was very positive. Some concerns were addressed which I would like to present to you and the Commission.

(1) With regard to 4722(a)(2): "A registered professional nurse with responsibility for the patient."

My committee believes it is very important that this nurse also be knowledgeable about the patient, and not have mere supervisory responsibility. A nurse administrator,acting in a supervisory capacity without bedside contact, would be less knowledgeable about the patient's health care concerns, wishes, and values than would a nurse with bedside responsibility for the patient.

(2) With regard to 4722(a)(5) ":...a member of the community who is not employed by or regularly associated with the primary physician, the health care institution, or employees of the health care institution."

This would seem to eliminate community members who regularly serve on, but are not employed by, ethics committees and who would have more knowledge about ethical end-of-life medical decisions than community members with no ethics committee experience. This would also seem to eliminate the independent Ombudsman who often is involved in these kinds of decisions in longterm care facilities. Is this the intent of your recommendation?

(3) With regard to 4724: "....decisions relating to refusal or withdrawal of life-sustaining treatment may not be approved if any member of the surrogate committee is opposed."

Members of my committee expressed the same concern raised by Dr. Robert Orr in his memo dated 3/16/98 that a single party might have veto power over a medical decision that the other surrogate committee members believe is in the patient's best interest. Our committee was divided between those who felt that some type of supermajority vote would be sufficiently protective of vulnerable patients, and others who agreed with the recommendation requiring a unanimous decision in such cases.

Our Bioethics Committee wishes to thank you and the Commission for your effort and for the opportunity to provide input.

Yours truly,

Linda Daniels

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